

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

MARY L. FOREMAN)	
Claimant)	
VS.)	
)	
SALVATION ARMY)	Docket No. 169,430
Respondent)	
AND)	
)	
THE HOME INSURANCE COMPANY)	
Insurance Carrier)	
AND)	
)	
KANSAS WORKERS COMPENSATION FUND)	

ORDER

Respondent appeals from an Award entered by Special Administrative Law Judge Douglas F. Martin on May 17, 1996.

APPEARANCES

Claimant appeared by her attorney, Jeff K. Cooper of Topeka, Kansas. Respondent and its insurance carrier appeared by their attorney, John David Jurcyk of Lenexa, Kansas. The Kansas Workers Compensation Fund appeared by its attorney, Bob W. Storey of Topeka, Kansas.

RECORD AND STIPULATIONS

The Appeals Board has adopted the stipulations listed in the Award. The Appeals Board has also reviewed and considered the record listed in the Award. The original record submitted to the Board did not include exhibits introduced at the deposition of

Dr. David E. Thurston. The parties have, by stipulation, separately submitted those exhibits and they have been considered as part of the record in this appeal.

ISSUES

The issues raised on appeal are as follows:

- (1) Whether claimant met with personal injury by accident in a series of accidents through August 31, 1992.
- (2) Whether respondent had notice of claimant's accidental injury and, if not, whether prejudice resulted.
- (3) Whether claimant's accidental injury arose out of and in the course of her employment.
- (4) What is the nature and extent of claimant's disability?
- (5) What is the liability, if any, of the Kansas Workers Compensation Fund?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record and considering the arguments, the Appeals Board concludes that the Award should be modified. The Appeals Board concludes claimant is entitled to benefits for a 17.5 percent permanent partial disability. The Appeals Board also concludes that the Kansas Workers Compensation Fund is liable for 100 percent of the benefits awarded.

Claimant worked for respondent, Salvation Army, for approximately 19 years. At the time of the alleged injury she was the manager of one of the Salvation Army used clothing stores. Her duties included unloading crates of clothes, dishes, and shoes. She also unloaded furniture and rolls of carpet. She tagged and hung clothes as well as waited on customers.

In 1987, approximately five years before the accident involved in this case, claimant broke both heels and one ankle while working for respondent. She was off work approximately six months and received workers compensation benefits. In August 1988 Dr. Thurston, her treating physician, concluded that claimant would need to adjust her work so that she was able to remain seated at least 50 percent of time. Claimant testified that Dr. Thurston had advised her she would need to sit three hours per day as needed and not do heavy lifting.

Claimant testified at the preliminary hearing in this case that when she returned to work after the 1987 injury she was able to do her duties within the restrictions until April of 1992. In April of 1992 one of the employees who had been assisting claimant with the work left the job. Claimant also testified, however, that the work she performed after she returned to work was no different than the work she performed before. At the regular hearing she testified generally that the work involved being on her feet all day long. Although claimant's testimony does not appear to be consistent, it appears her duties became somewhat more strenuous when the one worker left.

First, the Appeals Board concludes that claimant did give notice. This conclusion is based upon the finding that the injury occurred and continued to occur up through August 31, 1992. Claimant gave notice no later than September 1, 1992, well within the statutory time limits of K.S.A. 44-520 (Ensley). The Board also finds respondent has not established prejudice from not getting earlier notice.

Claimant testified at the regular hearing that the work standing on her feet caused additional problems. Specifically, she testified that she had swelling in her ankles, a knee that bothered her because of the walking, and back and neck problems which she attributed to a change in the way she walked. She testified her knees would lock up and she could not walk. According to claimant, she finally came to the point where she felt she could no longer continue to do the job and on August 31, 1992, she did, in fact, leave employment.

Respondent contends claimant did not suffer any new injury in the course of her employment after the 1987 injury. From our review of the record as a whole, however, the Board concludes that claimant did suffer additional injury. The Board acknowledges that Dr. Thurston, the physician who treated claimant in both 1987 and in 1992, testified that he found no evidence of a new injury. At the same time, Dr. Thurston testified that the symptoms she related to him were worse than those she had previously related. As indicated in the Award, Dr. Edward J. Prostic finds, from his examination, that claimant has sustained new and additional injury. The other testifying physician, Dr. Dick A. Geis, does not give any opinion about the cause of claimant's injury but does testify that the symptoms presented to him in 1992 would have been consistent with her testimony of a worsening condition.

The parties agreed at the regular hearing in this case that claimant has a 20 percent permanent partial impairment of function. This stipulation is consistent with Dr. Prostic's testimony. Respondent did not agree, however, that the 20 percent resulted from this injury. Dr. Prostic testified that claimant has a 20 percent permanent partial impairment of function but attributes 15 percent of this impairment to a preexisting condition. He also testified that 2 to 3 percent of the impairment rating is for problems with claimant's neck.

The Board has concluded that claimant has failed to establish that the neck condition was work related. Dr. Prostic testified that he cannot give an opinion as to the

cause. Claimant appears to attribute the neck problems to a change in her walk or gait. Dr. Thurston testified that this is possible but, in the Board's view, he does not testify that it is probable. On balance, the Board finds the evidence fails to sustain claimant's burden that the neck symptoms included in Dr. Prostic's rating were work related. The Appeals Board, therefore concludes that of the 20 percent permanent partial impairment of function, 2.5 percent was not attributable to claimant's work.

The Board finds that the injury claimant sustained in 1992 was, in part, an aggravation of a preexisting condition. The law in effect at the time of claimant's injury, August of 1992, provided that in cases of an aggravation of preexisting injury, respondent was liable for the full extent of the resulting disability, including the preexisting impairment. Demars v. Rickel Manufacturing Corporation, 223 Kan. 374, 573 P.2d 1036 (1978). The Appeals Board therefore finds that claimant is entitled to benefits in this case based upon a functional impairment of 17.5 percent. Neither respondent nor the Workers Compensation Fund have requested a credit under K.S.A. 44-510a (Ensley) for benefits paid on the 1987 accident.

The Appeals Board has concluded that claimant is not entitled to additional work disability in this case because the work restrictions imposed in 1992 are essentially the same as those imposed in 1987. Dr. Thurston testified that he did not recommend any additional restrictions in 1992 that he had not already recommended in 1987. Dr. Prostic similarly testified that the restrictions he recommended were essentially the same as those previously recommended. In addition, even if the 1992 restrictions are viewed as somewhat more limiting, the vocational testimony by Michael J. Dreiling, the only vocational expert to testify, does not give opinions that take into account those preexisting restrictions. The Appeals Board therefore finds that claimant has not established any work disability greater than the functional impairment.

The Appeals Board concludes that the Kansas Workers Compensation Fund should be liable for 100 percent of the benefits awarded in this case. This conclusion is based upon the testimony of Dr. Prostic that the injuries in 1992 probably or most likely would not have occurred but for the preexisting injury. Respondent did have knowledge of the preexisting injury and impairment and that impairment would have constituted a handicap. The Appeals Board, therefore, finds the Fund liable for 100 percent of the benefits based upon the provision of K.S.A. 1992 Supp. 44-567.

AWARD

WHEREFORE, the Appeals Board finds that the Award entered by Special Administrative Law Judge Douglas F. Martin, dated May 17, 1996, should be, and is hereby, modified.

WHEREFORE, AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, Mary L. Foreman, and against the respondent, Salvation Army, its insurance carrier, The Home Insurance Company, and the Kansas Workers Compensation Fund for an accidental injury which occurred August 31, 1992, and based upon an average weekly wage of \$344.98 for 83 weeks of temporary total disability compensation at the rate of \$190.32 per week (the parties did not raise the amount or rate of temporary total disability as an issue) or \$15,796.56, followed by 332 weeks at the rate of \$40.25 per week or \$13,363.00, for a 17.5% permanent partial general disability, making a total award of \$29,159.56.

As of November 28, 1997, there is due and owing claimant 83 weeks of temporary total disability compensation at the rate of \$190.32 per week or \$15,796.56, followed by 190.57 weeks of permanent partial compensation at the rate of \$40.25 per week in the sum of \$7,670.44 for a total of \$23,467.00, which is ordered paid in one lump sum less any amounts previously paid. The remaining balance of \$5,692.56 is to be paid for 141.43 weeks at the rate of \$40.25 per week, until fully paid or further order of the Director.

The Appeals Board approves and adopts all other orders as stated in the Award.

IT IS SO ORDERED.

Dated this ____ day of November 1997.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Jeff K. Cooper, Topeka, KS
John David Jurcyk, Lenexa, KS
Bob W. Storey, Topeka, KS
Bryce D. Benedict, Administrative Law Judge
Douglas F. Martin, Special Administrative Law Judge
Philip S. Harness, Director